United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

233

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24749

MARGARET F. MORENO, Appellant

v.

JOHN S. GLEASON, JR.,
Individually and as Administrator
of Veterans Affairs, Appellee

On Appeal from the United States
District Court for the District of Columbia

Alexander W. Sierck
Wald, Harkrader, Nicholson & Ross
1320 Nineteenth Street, N. W.
Washington, D. C. 20036

Attorney for Appellant

James A. Greer, II
LeBoeuf, Lamb, Leiby & MacRae
One Chase Manhattan Plaza
New York, New York 10005

Of Counsel

INDEX

	page
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	1
STATUTES AND REGULATIONS INVOLVED	8
STATEMENT OF POINTS	8
SUMMARY OF ARGUMENT	8
ARGUMENT	9

I. The Constitution guarantees appellant the right to seek judicial review of the arbitrary and unfair action taken by the VA in a benefits case in spite of the fact that Congress has attempted to divest the courts of jurisdiction to hear such cases.

CONCLUSION	16

Statement of Question Presented

The question is:

Whether the Constitution guarantees appellant the right to seek judicial review of the arbitrary and unfair action taken by the VA in a benefits case in spite of the fact that Congress has attempted to divest the courts of jurisdiction to hear such cases.

This case has not previously been before this Court.

TABLE OF CASES

Cases:	Page
Baker v. Carr, 369 U.S. 186 (1962)	16
* Goldberg v. Kelly, 399 U.S. ___, 90 S.Ct. 1011 (1970)	12,13,14
Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964)	15
Social Security Board v. Nierokto, 327 U.S. 358 (1946)	10
Van Horn v. Hines, 74 U.S.App.D.C. 214, 122 F.2d 207 (1941)	11
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	10,15
Constitution of the United States:	
Fifth Amendment	12,13
Fourteenth Amendment	15
Statutes:	
38 U.S.C. §211(a)	10,11,15
Articles:	
Heyman & Gilhool, The Constitutionality of Imposing Increased Community Cost on New Suburban Residents Through Subdivision Extractions, 73 Yale L. J. 1119 (1964)	16

* cases + authorities upon which principal reliance is placed

Jurisdictional Statement

This is an appeal from an order of the District Court dismissing plaintiff's complaint for declaratory judgment on the grounds that her cause of action against the appellee was not subject to judicial review. The jurisdiction invoked by the complaint was founded upon 28 U.S.C. §§1391 and 2201. The order dismissing plaintiff's complaint was entered by the District Court on June 23, 1970. Plaintiff on July 22, 1970 filed her motion in the District Court for leave to appeal in forma pauperis; that motion was granted on September 16, 1970. The jurisdiction of this Court rests upon 28 U.S.C. §1291.

Statement of the Case

Colonel Aristides Moreno, appellant's late husband, had been receiving since 1926 a Veterans' Administration (VA) pension based upon a one hundred percent service-connected disability, namely cancer of the larynx, until his death in 1955 of cancer of the liver and gall bladder (Complaint pars. 5-6).

Following her husband's death, appellant made a timely demand for continuation of his service-connected

benefits in the form of death benefits payable to her, stating that her husband's death from cancer resulted from the service-connected cancer for which he had been receiving a pension (Complaint par. 7). Evidence readily available at the time of Colonel Moreno's death and continuously available thereafter proved that Colonel Moreno's terminal cancer was the direct outgrowth of the service-connected laryngeal cancer for which he was retired. Under long-standing VA policy the Colonel's terminal cancer and death was "service-connected" within the meaning of the Veteran's benefit laws.

However, after lengthy proceedings, the Board of Veterans' Appeals in 1957, following a perfunctory hearing, refused to continue appellant's benefits, senselessly ignoring uncontroverted evidence placed before it that her husband's death from cancer of the liver was caused by his service-connected disability, the cancer of his larynx (Complaint pars. 8-9). Not only did the Board ignore the testimony of Colonel Moreno's physician, but it relied on ex parte opinions of VA doctors, who had no greater competence and even less familiarity with the case than did Colonel Moreno's doctor. The Board also ignored, suppressed, or simply failed to

examine, the original report of the autopsy performed on Colonel Moreno's body, which tended to support appellant's contention that her husband's death was service-connected. Instead, it inexplicably relied on a copy of a later and, as it turned out, completely erroneous autopsy report of unknown origin and authenticity, which tended to support the Board's decision.

To appellant's prejudice, the Board in 1957 failed without cause to take even the simplest steps to obtain information then readily available from the civilian hospital that performed Colonel Moreno's laryngectomy; such information strongly supported appellant's contention that her husband's death was directly related to his earlier service-connected laryngeal cancer. The record indicated that the Board in reaching its 1957 decision failed to consult any competent pathologist regarding the theoretical possibility that the two cancers were related. Instead the Board assumed, quite incorrectly as the record shows, that appellant could not possibly prove even a theoretical possibility of a connection between Colonel Moreno's laryngeal cancer and his fatal cancers.

Furthermore, the Board failed to ascertain that there was evidence of personal animosity against appellant

by certain high-ranking Army medical officers who were directly connected with important aspects of the case, including supervision of the Army doctor who performed the autopsy. Nor did the Board determine that there was evidence that one of these officers, then the Commandant of the Walter Reed Army Hospital, where Colonel Moreno spent his dying days and where he ultimately died, had expressed his opinion that the Colonel's death was service-connected.

During the 1957 proceedings, appellant was further prejudiced because she was unable to obtain representation by an attorney (Complaint par.8) as a result of the statutory ten dollar limit on counsel fees. During the 1957 proceedings, appellant, as is the custom in VA proceedings, was assisted by a demonstrably incompetent representative of a veteran's organization. Her representative took no effective part in assisting appellant with her case; he did not even make a recorded attempt to controvert the Board's "evidence," but instead acted as if he were the handmaiden of the VA, which in fact he was. Despite her continuing efforts, it was not until 1964 that appellant found an attorney willing to press her case for no pay.

In 1964 appellant attempted to have the Board of Veterans' Appeals reinstate her wrongfully terminated

benefits, again on the basis of expert medical testimony that her husband's death did indeed result from his service-connected disability. The Board reinstated her benefits, but only prospectively (Complaint pars. 11-12), and then only after a series of obstructionist tactics.

For several months the VA arbitrarily denied appellant's duly-designated attorney access to her husband's medical records on the ground that to do so would be an unwarranted exercise of its discretion and might reflect adversely on the veteran's record. The delay caused a loss of benefits subsequently awarded. Further delay and even greater prejudice resulted from the VA's violations of its agreement with appellant's counsel that it would obtain the medical evidence then available from the civilian hospital that performed Colonel Moreno's laryngectomy and submit that evidence to the independent expert pathologist it retained at plaintiff's request.

As a result of these unreasonable delays, it was not until August 25, 1965, that the VA ruled that appellant's wrongfully terminated benefits should be reinstated. Moreover, even after the VA ruled against reinstating the back benefits due her, the VA engaged in needlessly dilatory

tactics for nearly six months before commencing the full monthly payments to which she was admittedly entitled.

In 1968 appellant petitioned the Board to reconsider its ruling that the benefits, admittedly wrongfully withheld since 1957, could not be repaid her. In 1969 the Board rejected appellant's petition for reconsideration despite a clear showing that:

(1) this denial was inconsistent with its ruling that plaintiff's husband's death stemmed from the service-connected disability;

(2) these inconsistent rulings are attributable solely to the Board's arbitrary refusal in 1957 to consider the uncontroverted evidence that Colonel Moreno's death was the result of his service-connected disability and the Boards unwillingness in the 1964 proceeding to admit that it had committed in 1957 a clear and unmistakable error in so doing; and

(3) the VA's refusal to reinstate the wrongfully withheld benefits is at odds with its contemporaneous ruling on nearly identical facts (Matter of Jamison, XC-16-836-644), where, upon her first request, the widow had the veterans benefits continued after her husband's death as a matter of course.

On February 5, 1970, appellant filed in the district court a complaint for declaratory judgment seeking a ruling that the appellee Administrator of Veterans Affairs had wrongfully terminated veterans benefits to which she was entitled. Appellee on April 15, 1970, filed a motion to dismiss plaintiff's complaint.

Appellee in its motion argued that the federal courts are by federal statute (38 U.S.C. §211(a)) divested of jurisdiction to review claims for veterans' benefits. Appellant in turn asserted that the motion to dismiss could not be granted because no claim for benefits within the meaning of the statute is alleged in the complaint and because even if such a claim were deemed to have been alleged, the statute divesting the federal courts of jurisdiction is in this case an unconstitutional denial to appellant of due process of law.

On June 23, 1970, the Hon. Joseph C. Waddy, District Judge, granted appellee's motion to dismiss appellant's complaint. On July 22, 1970, appellant filed a motion for leave to appeal that ruling in forma pauperis, and on September 17, 1970, Judge Waddy granted that motion.

On August 12, 1970, P. L. 91-376 became law. This law was an attempt by Congress to divest the federal courts

of jurisdiction to hear all cases which in any way involve veterans' benefits.

References + Rulings - were

Statutes and Regulations Involved

prior to August 12, 1970

> ... [T]he decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any other Court of the United States shall have the power or jurisdiction to review any such decision.
> 38 U.S.C. §211(a)

effective August 12, 1970, PL 91-376

> ... [T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have the power or jurisdiction to review any such decision by or action in the nature of mandamus or otherwise.
> 38 U.S.C. §211(a)

Summary of Argument and Statement of Points

VA benefits may no longer be deemed gratuities but are legitimate property rights; given that fact, case law is well established that property rights may not be abrogated without a fair hearing. Because appellant alleged that for no rational reason her case was treated differently from comparable ones, she is entitled to seek judicial review.

Argument

THE CONSTITUTION GUARANTEES APPELLANT THE RIGHT TO SEEK JUDICIAL REVIEW OF THE ARBITRARY AND UNFAIR ACTION TAKEN BY THE VA IN A BENEFITS CASE REGARDLESS OF WHETHER CONGRESS HAS ATTEMPTED TO DIVEST THE COURTS OF JURISDICTION TO HEAR SUCH CASES

Appellant submits that arbitrary and unfair action taken by the Veterans Administration cannot be made categorically immune from judicial review. Appellant does not necessarily contend that every one of the several hundred thousand VA claims processed annually is subject to judicial review as a matter of consititutional right, but appellant does assert that in those cases where the VA has taken action without a hearing, where the VA has conducted a patently unfair hearing or where the VA does not treat comparable cases with consistency, judicial review is guaranteed under the federal constitution. This assertion is amply supported by existing case law.

Certainly, a party able to show a pattern of racial or religious discrimination in the award of VA benefits would not without judicial remedies. Cf. Yick Wo v. Hopkins, 118 U.S. 356 (1886). Likewise the Constitution guarantees a forum in the federal courts to the plaintiff alleging that the VA discriminates against pacifists or against non-members of the American Legion or the Veterans of Foreign Wars. So too are the federal courts required to rule on the parameters

of a federal agency's jurisdiction; the agency itself may not finally decide the limits of its own power. Social Security Board v. Nierokto, 327 U.S. 358, 369 (1946).

The government argued with success at the district court level that the former version Section 211(a) divested the federal courts of jurisdiction in all cases involving claims for benefits, relying only on the language of the statute itself. However, the district court result may be nothing more than recognition of a long line of cases reading Section 211(a) in as literal and niggardly fashion as possible. Typically, in the case of Van Horn v. Hines, 74 U.S.App.D.C. 214, 122 F.2d 207 (1941), cert. denied 314 U.S. 689 (1941), where plaintiff unsuccessfully sought review of the VA's refusal to nullify his wife's renunciation of her share of his VA benefits, this court 20 years ago observed that:

> There can be no doubt that veteran's benefits are gratuities and establish no vested rights in the recipient . . . . And this being so . . . Congress may in turn withdraw jurisdiction from the courts over the decisions of the Administrator in relation thereto. (122 F.2d at 209)

In expanding the scope of Section 211(a) to include all VA benefits cases, not merely claims cases, there is no indication that Congress has ceased to think of VA benefits as mere gratuities, the orderly grant of which may be sacrificed in

the name of tidy judicial dockets. See generally for the legislative history of P. L. 91-376 as applicable to this point Vol. 9. 1970 U.S. Code Cong. and Admin. News pp. 3489-3491, 3499-3503 (September 5, 1970).

The rationale of the traditional view that VA benefits are nothing but gratuities awarded at the sufferance of the federal bureaucracy is now discredited. The Supreme Court has now recognized that seemingly gratuitous benefits paid by the government are indeed "a matter of statutory entitlement for persons qualified to receive them." Goldberg v. Kelly, 399 U.S. ____, 90 S.Ct. 1011, 1017 (1970).

The Goldberg v. Kelly case held that the right to due process of law guaranteed under the Fifth Amendment of the Constitution was denied a welfare recipient who was stricken from the public assistance rolls without a fair hearing. The Court based its decision on the finding that:

> It may well be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights which do not fall within traditional common-law concepts of property. It has been aptly noted that
>
> "[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licences, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government:

> subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced." Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L. J. 1245, 1255 (1965). See also Reich, The New Property, 73 Yale L. J. 733 (1964).

The decision in Goldberg v. Kelly compels a like holding in cases relating to veterans benefits, for indeed they too are "essentials, fully deserved" (90 S.Ct. at 1017, fn. 8). Surely, the Congress cannot have viewed VA benefits as non-essentials or as not fully deserved; in any event, these benefits are both essential and fully deserved in this case.

Plaintiff has alleged that her veterans benefits were wrongfully terminated in the 1957 VA proceedings, a proceeding which she alleges to be unfair. In Goldberg v. Kelly, the Supreme Court prohibited the termination of benefits without a fair hearing. Because of that decision, the district court was in error in rejecting out-of-hand the claim of an elderly widow that her benefits were terminated as a result of a hearing in which (1) she was not represented by counsel because of the peculiar, and perhaps unconstitutional,

VA regulation prohibiting counsel in VA cases to be paid more than the preposterous sum of ten dollars, and (2) the VA arbitrarily refused to consider the uncontroverted evidence justifying her demand. And such error deprived appellant of her Fifth Amendment right to due process.

Because appellant's VA benefits must be considered more than mere gratuities, then, under the doctrine of Goldberg v. Kelly, supra., Congress may not categorically prohibit judicial review of claims arising from them. The district court therefore had jurisdiction to hear plaintiff's case and erroneously chose not to exercise it.

Furthermore, regardless of whether veterans benefits are deemed gratuities or vested property rights, no statute that categorically divests the federal courts of all jurisdiction to review entire classes of administrative action can survive a constitutional challenge under the due process clause. As stated, it is beyond dispute that Section 211(a) cannot be relied upon to insulate the VA from judicial review of a charge that its action was cloaked in a pattern of racial or religious discrimination or even a charge that it gives preferred treatment to members of established veterans organizations.

For example, in a case where a plaintiff alleged that San Francisco city officials were granting all but persons of

Chinese origin city-required laundry licenses, the Supreme Court struck down the local ordinance because it conferred to its administrator "naked and arbitrary power to give or withhold consent," which delegation is "intolerable in any country where freedom prevails, as being the essence of slavery itself." Yick Wo v. Hopkins, 118 U.S. 356, 366, 370 (1886). Likewise, in this case, the VA has been cloaked with an unconstitutional delegation of absolute and arbitrary power.

Thus exceptions are required to be read into the seemingly absolute terms of Section 211(a). And appellant's case, on the basis of the allegations contained in the complaint, is one of those exceptions. Appellant alleges that the VA terminated her benefits, whereas in at least one nearly identical case,the VA continued the payment of benefits to the widow after the veteran's death as a matter of course. Such inexplicable agency conduct is not immune from judicial review.

An applicant for a liquor license "has the right to be treated in the same manner as successful applicants are." Hornsby v. Allen, 326 F.2d 605, 610 (5th Cir. 1964). Likewise the Fourteenth Amendment's equal protection clause mandates that in real property cases "similarly situated landowners may not be treated dissimilarly." Heyman & Gilhool, The

Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Extractions, 73 Yale L. J. 1119, 1125 (1964). In fact the VA's handling of appellant's case most nearly parallels the unconstitutional establishment of legislative districts of grossly unequal population described in Baker v. Carr, 369 U.S. 186, 226 (1962) as a "discrimination [that] reflects no policy, but simply arbitrary and capricious action." Such unwarranted action in that case, just as in this case, is a proper subject for judicial review.

Conclusion

Even though Congress by statute has attempted to divest the federal courts of jurisdiction to hear any case involving a VA benefits controversy, the Constitution requires that statute to be ignored in this case.

As long as this Court does not deem VA benefits to be undeserved non-essentials, this Court must recognize that the due process clause guarantees appellant the right to a forum in the federal courts to seek relief from arbitrary and unfair action taken by the VA. For this reason, the judgment of the district court should be reversed, and this case should be remanded with instructions to grant the relief prayed for in the complaint for declaratory judgment if the facts as alleged in the complaint are proven.

Respectfully submitted,

Alexander W. Sierck

ALEXANDER W. SIERCK
Attorney for Appellant

JAMES A. GREER, II
Of Counsel

No. 24749

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARGARET F. MORENO,

Appellant,

v.

JOHN S. GLEASON, JR., Individually and as Administrator of Veterans Affairs,

Appellee.

BRIEF FOR THE APPELLEE

L. PATRICK GRAY, III,
Assistant Attorney General,

THOMAS A. FLANNERY,
United States Attorney,

ALAN S. ROSENTHAL,
WALTER H. FLEISCHER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

I N D E X

	Page
Issues presented	1
Statutes involved	7
Summary of argument	7
Argument:	
I. Congress may establish a program of benefits under which an administrative denial of benefits is final and unreviewable by the courts.	8
II. The district court lacked jurisdiction over the subject matter.	14
Conclusion	15

CITATIONS

Cases:

Barefield v. Byrd, 320 F.2d 455 (C.A. 5), certiorari denied, 376 U.S. 928	8,10
Beck v. Washington, 369 U.S. 541	14
Daniel v. Goliday, 398 U.S. 73	12
*Goldberg v. Kelly, 397 U.S. 254	8,11,12
Honda v. Clark, 386 U.S. 484	8,10
King v. Finch, 428 F.2d 709 (C.A. 5)	12
*Lynch v. United States, 292 U.S. 571	9-10
*Milliken v. Gleason, 332 F.2d 122 (C.A. 1), certiorari denied, 379 U.S. 1002	10
Milwaukee Elec. Ry. & Light Co. v. State of Wisconsin ex rel. City of Milwaukee, 252 U.S. 100	13-14
Redfield v. Driver, 364 F.2d 812 (C.A. 9)	10
Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667	15
Tracy v. Gleason, 126 U.S.App.D.C. 415, 379 F.2d 469	9-10

* Cases and authorities chiefly relied upon.

Cases: Page

United States v. King, 395 U.S. 1---------- 10,15

*Van Horn v. Hines, 74 U.S.App.D.C. 214, 122 F.2d 207, certiorari denied, 379 U.S. 1002---------- 8,10

Washington v. United States, 130 U.S.App.D.C. 374, 401 F.2d 915---------- 14

Wells v. United States, 280 F.2d 275 (C.A. 9)----- 15

Statutes:

*28 U.S.C. 1346(d)---------- 1,7
28 U.S.C. 1361---------- 14
28 U.S.C. 2201---------- 14-15
*38 U.S.C. 211(a)----------1,2,7-9,14-15
38 U.S.C. 301---------- 13
38 U.S.C. 315---------- 13
38 U.S.C. 341---------- 13
38 U.S.C. 401---------- 2,13
38 U.S.C. 501---------- 13
38 U.S.C. 3001---------- 13
38 U.S.C. 4003(a)---------- 4

Act of August 12, 1970, P.L. 91-376, 84 Stat. 787- 9

Veterans' Administration Regulations:

38 C.F.R. 3.105---------- 4
38 C.F.R. 3.152---------- 13
38 C.F.R. 3.400(h)---------- 4
38 C.F.R. 19.155---------- 4
38 C.F.R. 19.2(b)---------- 4

Miscellaneous:

H. Rept. 91-1166, 91st Cong., 2d Sess. (1970)----- 9,11

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24749

MARGARET F. MORENO,

Appellant,

v.

JOHN S. GLEASON, JR., Individually and as Administrator of Veterans Affairs,

Appellee.

BRIEF FOR THE APPELLEE

ISSUES PRESENTED

1. Whether Congress may constitutionally establish a program of Veterans' benefits, in which a denial of benefits by the Veterans' Administration is final and unreviewable by the courts.

2. Whether the district court had subject-matter jurisdiction over this action, in light of 38 U.S.C. 211(a), explicitly denying it jurisdiction over such actions, and 28 U.S.C. 1346(d), which generally denies district court jurisdiction of "any civil action or claim for a pension."

This case has not previously been before this Court.

STATEMENT OF THE CASE

This appeal is taken from an Order of the district court dismissing plaintiff's complaint (1) as barred by 38 U.S.C. 211(a), which makes final and conclusive decisions of the Veterans' Administrator upon questions of law or fact arising under laws administered by the Veterans' Administration, and (2) for lack of subject-matter jurisdiction. In this case, the plaintiff, Mrs. Margaret F. Moreno, sought review of determinations of August 25, 1965, and July 10, 1969, of the Board of Veterans' Appeals (the final administrative tribunal), which granted plaintiff death and indemnity compensation effective July 27, 1964, but denied her claim that she was entitled to such benefits effective October 6, 1955.

The relevant facts are set forth in the July 10, 1969, opinion of the Board of Veterans' Appeals (Exh. A, to plaintiff's Complaint). Plaintiff's claim of entitlement to an award of dependency and indemnity compensation was based upon the allegation that her husband's death in 1955 was service-connected. See 38 U.S.C. 401, et seq. That death had resulted from cancer involving the liver and gallbladder, but the primary site of which could not be ascertained. Plaintiff asserted that the terminal cancer was service-connected because it was causally related to cancer of the larynx, for which the decedent had undergone a successful operation in 1926--almost 30 years earlier--while in the Army.

In September 1957, the Board of Veterans' Appeals sustained the denial of the claim. The record before the Board included service and postservice reports of examination, and the autopsy report as well as opinions of the Chief Medical Director of the VA. The widow, assisted by a representative of a national service organization, testified, and a private physician testified in support of her claim.

On July 27, 1964, a request for reconsideration of the Board's 1957 decision was filed. The record was reviewed by six associate members of the Board of Veterans' Appeals who had not participated in the 1957 decision. Prior to passing upon the request for reconsideration, the Board also referred the records to an independent medical specialist. After reviewing all available clinical records and microscopic slides, this specialist concluded that, although not beyond biological possibility, it was improbable that a transfer (metastasis) of laryngeal carcinoma to the liver had occurred, had existed for years in a well-differentiated form, had "dedifferentiated" and had become anaplastic almost 30 years later. For he pointed out that there was no evidence that the usual sites of metastasis of laryngeal carcinoma were ever involved, and almost all laryngeal carcinomas that are not cured become manifest by recurrence or metastasis within five years. He added that it was most unusual if not unlikely that the carcinoma at autopsy would have originated in the larynx, but its histological type was compatible and no primary source was

demonstrated. He concluded that the evidence did not permit the certain elimination of the larynx as the primary site of the terminal carcinoma, but, if this was a case of metastatic carcinoma from the larynx, the statistics of general experience with primary carcinoma of the larynx "hardly recognize the possibility that such a combination of events" has occurred.

With the assistance of this independent report, on August 25, 1965, the Board rendered a decision holding:

> (1) There was no "obvious error" of fact or law in the 1957 decision, and it was therefore a "final adjudication." (38 U.S.C. 4003(a))
>
> (2) No "new factual basis" warranting allowance of the benefit sought had been presented since the 1957 decision. (38 C.F.R. 19.155)
>
> (3) On the same factual basis, but on difference of opinion rather than a finding of error, an "administrative allowance" of service connection for the cause of death was approved. (38 C.F.R. 19.2(b)).

Thus, plaintiff was awarded benefits pursuant to a regulation which allow revisions of prior decisions based upon a "difference of opinion" rather than a showing of clear error in the prior decision (38 C.F.R. 3.105), and which provide that awards on the basis of a difference of opinion are prospective only (38 C.F.R. 3.400(h)).[1/] This award was made

---

1/Initially the regulation permitted an award based upon a difference of opinion to be effective only from the date of the Board's decision. Accordingly, Mrs. Moreno's award was made effective on August 25, 1965, the date of the Board's decision. However, subsequently the regulation (38 C.F.R. 3.400(h)(2)) was amended to permit awards as of the date of the application for reconsideration which led to the award. Accordingly, in its supplemental decision of July 10, 1969, the Board revised Mrs. Moreno's award to make it effective July 27, 1964.

because three of the six members of the Board, although agreeing that there was no error established in the prior decision, felt that there was some latitude for different views in evaluating the facts, and it was of sufficient probative value to support a "difference of opinion." The Acting Chairman of the Board approved their recommendation that an award be made on that basis.

Plaintiff continued to seek reconsideration of the Board's decision, insofar as it declined to award her benefits effective in 1955. On July 10, 1969, the Board entered a further opinion affirming its prior rulings,[2/] after yet another review of the entire record. The Board rejected the contention that the 1957 record was inadequate for it to render a decision at that time: "the evidence of record...was adequate for proper adjudicative action based on sound medical principles." Also rejected were attacks on the adequacy of her representation at the 1957 hearing: "Mrs. Moreno's representative at that time had substantial experience in disability claims work involving Veterans Administration benefits and also was experienced in arguing cases before the Board. His failure to request the slides can hardly be called negligence or incompetence. He, like the Board, was aware of the fact medically it was for all intents and purposes

---

2/The Board did, on July 10, 1969, modify the award to give plaintiff about one extra year of benefits. See n. 1 , p. 4 , supra.

unheard of that carcinoma of the gallbladder and liver could be related to a carcinoma of the gallbladder which was considered cured 30 years previously." The slides might be thought more likely to harm his case than help it.

With regard to the procedures followed earlier, after noting that plaintiff had had full opportunity to present all possible evidence, the Board added:

> ***In order to help her, rather than to burden her, in establishing the required relationship between the two carcinomas, the Board, on two occasions, submitted the records to the office of the Chief Medical Director of the Veterans Administration for review and an opinion. On both occasions negative replies were received. Everything which in light of medical experience seemed to be reasonable was done. It should also be noted that, at the time of the 1957 decision, there was no provision under the law for the Board to obtain an opinion from an independent medical specialist. At the time of the 1965 review such a provision had been enacted into law and thereafter the Board utilized this on two occasions with the hope, not of justifying its prior decision but, of establishing the widow's entitlement to the benefits sought.
>
> In summary, this Board believes that every reasonable effort was expended prior to the 1957 determination to establish a relationship between the service-connected laryngectomy and the disease entity which caused death. The opinion of the independent medical specialist does not support a conclusion that the Board's determination was clearly and unmistakably erroneous, nor does it cast any doubts on the reasonableness of the actions which preceded that decision. The opinion of the independent medical specialist merely offered a reasonable basis for difference of opinion. A careful reading of the opinion of the independent medical specialist clearly shows that he is not convinced there is such a relationship.

Finally, the Board rejected the contention that its ruling was "inconsistent" with the action of the VA in awarding benefits in a case plaintiff claimed was similar, noting that the other

decision had not been made at the appellate level, no explanation was made why service-connection was thought to be established on the record there, and the interval between the laryngectomy and the death was 12 years, rather than 30.

As noted, the district court dismissed the complaint, on the grounds that (1) 38 U.S.C. 211(a) precluded judicial review; and (2) the court lacked subject matter jurisdiction.

STATUTES INVOLVED

38 U.S.C. 211(a) provides:

> On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

28 U.S.C. 1346(d) provides:

> (d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

SUMMARY OF ARGUMENT

Both grounds relied upon by the district court in dismissing this action--that it is barred by the finality provisions of 38 U.S.C. 211(a), and that the district court lacks subject matter jurisdiction--are clearly correct. Indeed, the decision below is firmly grounded not only in the language of 38 U.S.C. 211(a) but also in 28 U.S.C. 1346(d), providing that the district courts do not have jurisdiction of "any civil action or

claim for a pension."

Appellant concedes as she must that this action is barred by the terms of 38 U.S.C. 211(a), but asserts that that section is unconstitutional. Congress clearly may define the circumstances under which the sovereign may be sued. Honda v. Clark, 386 U.S. 484, 501. The contention that a claim to veterans dependents compensation asserts a "property right" and therefore under Goldberg v. Kelly, 397 U.S. 254, an administrative denial of such a claim must be judicially reviewable at least on some grounds, also is without merit. It is certainly within the authority of Congress to establish benefits without giving them a legal status comparable to property rights, and, as appellant concedes (br. 10), "there is no indication that Congress has ceased to think of VA benefits as mere gratuities." The constitutional authority of Congress to withhold jurisdiction from the courts over such decisions of the Veterans Administrator, has been correctly sustained by this Court and other courts. E.g., Van Horn v. Hines, 74 U.S.App.D.C. 214, 122 F.2d 207 (1941), certiorari denied, 379 U.S. 1002; Barefield v. Byrd, 320 F.2d 455 (C.A. 5), certiorari denied, 376 U.S. 928.

ARGUMENT

I.

CONGRESS MAY ESTABLISH A PROGRAM OF BENEFITS UNDER WHICH AN ADMINISTRATIVE DENIAL OF BENEFITS IS FINAL AND UNREVIEWABLE BY THE COURTS.

It is not contested by appellant that by its terms 38 U.S.C. 211(a) bars this suit. That provision, as amended by the Act of

August 12, 1970, P.L. 91-376, 84 Stat. 787, is as follows (emphasis added):

> On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents and survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

The purpose of that section is to make final "any and all decisions of the Administrator on questions of entitlement to veterans' benefits," except for certain contractual benefits. H. Rep. 91-1166, 91st Cong., 2d Sess. (1970), p. 9.[3/]

Appellant's contention is that it is unconstitutional for Congress to provide only administrative remedies for a denial of benefits under laws administered by the VA and to exclude judicial review. That contention has been squarely rejected by the courts upon several occasions. As stated in Lynch v. United States, 292 U.S. 571, 582, "When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. United States v. Babcock,

3/The 1970 Amendments to the finality provision were designed to overrule Tracy v. Gleason, 126 U.S.App.D.C. 415, 379 F.2d 469, which had held that a suit based upon a termination of veterans' benefits was not barred by 38 U.S.C. 211(a), because it was not a "claim" for such benefits or payments. The House Committee described Tracy as a "fairly tortured construction" of the finality provision. H. Rep. 91-1166, 91st Cong., 2d Sess. (1970), p. 10.

But even under Tracy, plaintiff's suit would have been barred, for it is based upon a denial of an application for benefits, rather than a termination of such benefits.

250 U.S. 328, 331. It may limit the individual to administrative remedies. Tutun v. United States, 270 U.S. 568, 576." Accordingly, the constitutionality of the finality provision under attack here has been sustained by this Court and at least two other courts of appeals. Van Horn v. Hines, 74 U.S.App.D.C. 214, 122 F.2d 207 (1941), certiorari denied, 314 U.S. 689; Milliken v. Gleason, 332 F.2d 122 (C.A. 1), certiorari denied, 379 U.S. 1002; Barefield v. Byrd, 320 F.2d 455 (C.A. 5), certiorari denied, 376 U.S. 928.

As is apparent from the foregoing, the constitutionality of the finality provision is not dependent upon the characterization of the benefits, as "gratuities" or "rights", but is sustainable upon the settled doctrine "that the Government is ordinarily immune from suit, and that it may define the conditions under which it will permit such actions." Honda v. Clark, 386 U.S. 484, 501; United States v. King, 395 U.S. 1, 4. In any event, it is perfectly clear that the veterans pension benefits program was established as a gratuitous one. And as appellant concedes (br. 10) [redacted], "there is no indication that Congress has ceased to think of VA benefits as mere gratuities."[4/] The House Report recommending that the finality provision be amended to overrule Tracy v. Gleason, 126 U.S.App.D.C. 415, 379 F.2d 469, for example, makes clear that for finality purposes, the statute distinguishes

4/The courts have repeatedly stated that benefits of the kind here involved are "gratuitous". E.g., Redfield v. Driver, 364 F.2d 812 (C.A. 9), and cases cited therein. There is no reason to think that Congress has ever departed from that traditional view of such benefits to veterans' dependants.

"noncontractual" benefits of the kind here involved from "contractual" benefits such as National Service Life Insurance (38 U.S.C. 701, et seq.). See H. Rep. 91-1166, 91st Cong., 2d Sess. (1970), pp. 8-11.

We know of no judicial authority to the effect that it is constitutionally impermissible for Congress to provide as it has in 38 U.S.C. 211(a) that the administration of a benefits program which it creates is to be left wholly to the agency which it has designated to carry out the statutory mandate. And most assuredly Goldberg v. Kelly, 397 U.S. 254, upon which appellant relies (br. 11-13) does not support any such proposition. What the Supreme Court held in Goldberg was simply that a recipient of welfare benefits was entitled to receive an evidentiary hearing before--rather than after--the proposed termination of his benefits took effect in order to assure that any termination would be in accordance with the statutory mandate respecting benefit eligibility. That scarcely can be taken as meaning that, as an integral part of a statutory program authorizing certain types of benefits and providing for an administrative hearing before a tribunal (the Board of Veterans Appeals) of denials of claims, Congress cannot foreclose judicial review of the agency decision. The short of the matter is that Congress has conditioned entitlement to pension benefits upon a determination by the Veterans Administration--not the courts--of an eligibility for those benefits. Nothing in the

Constitution precludes giving effect to this plain mandate.[5/]

While Goldberg is entirely inapplicable in all events, it should be noted that that case involved a termination of benefits which the plaintiff had been receiving, rather than an initial denial of a claim as is involved in the present case.[6/] Cf. King v. Finch, 428 F. 2d 709, 713 (C.A. 5), which reads Goldberg v. Kelly to mean:

> . . . that entitlement of an individual to benefits attaches at some point in the award process, after which there is a right that cannot be infringed but by due process or just compensation, but until that time the underlying substantive decision whether a given class of persons should receive benefits remains with the legislature subject to equal protection limits.

As is apparent from its decision denying reconsideration, the VA did not terminate any benefits which were being paid Mrs. Moreno. Instead it denied her claim for dependency and indemnity compensation in 1957, and then partially granted it in 1965 (and modified that grant in 1969 in plaintiff's favor). To the extent that the benefits were granted (i.e., effective July 27, 1964), they were not terminated, suspended, or reduced. Appellant's repeated statements that her benefits were "terminated" (e.g., br. 12) apparently are based upon an allegation in the

---

5/We deal below with appellant's suggestion (br. 13-15) that she makes a reviewable allegation of deprivation of equal protection.

6/In Daniel v. Goliday, 398 U.S. 73, the Court stated that its ruling in Goldberg v. Kelly, supra, "dealt only with termination and suspension, not reduction, of benefits," and remanded that case to the district court for further consideration of the question of the bearing of those decisions upon the treatment of benefit reductions.

complaint (para. 6) that her husband had been receiving a pension based upon a service-connected disability prior to his death. But a denial of the widow's claim is not a "termination" of the husband's pension. The widow's separate application for dependence and indemnity compensation must be filed under a different section of the Act.[7/] 38 U.S.C. 3001; 38 C.F.R. 3.152. It cannot be granted on the basis that the veteran had a service-connected disability for which he received benefits, but only on the basis that he died of a service-connected injury or disease.

Appellant also asserts that she has stated a claim of violation of equal protection of the laws. The sole basis of that argument is the contention that one of the thousands of other claimants of VA benefits was awarded benefits on initial application, allegedly on similar medical facts. However, "the Fourteenth Amendment does not in guaranteeing equal protection of the laws, assure uniformity of judicial decisions," nor presumably of administrative decisions in weighing medical evidence. Milwaukee Elec. Ry. & Light Co. v. State of Wisconsin ex rel.

7/ The general benefit provisions governing the veterans' own claim, are contained in 38 U.S.C. 301, et seq. The provisions governing the widows' death benefit claims are contained in 38 U.S.C. 401, et seq., and 38 U.S.C. 501, et seq. See also 38 U.S.C. 341. The veteran's own pension during his lifetime may include additional compensation for his dependents, which is payable to him. E.g., 38 U.S.C. 315.

City of Milwaukee, 252 U.S. 100, 106; Beck v. Washington, 369 U.S. 541, 554-555. Moreover, the Board of Veterans' Appeals more than adequately explained why it did not view the administrative decision relied upon by appellant as controlling.[8/]

II

THE DISTRICT COURT LACKED JURISDICTION OVER THE SUBJECT MATTER.

The second ground of the district court's judgment was that it lacked jurisdiction over the subject matter. That holding, not discussed by appellant, is plainly mandated by both 38 U.S.C. 211(a), which explicitly prohibits district court jurisdiction over such veterans' matters, as well as 28 U.S.C. 1346(d), which provides that "The district court shall not have jurisdiction under this section of any civil action or claim for a pension." The district courts are courts of jurisdiction prescribed by Congress and it is apparent that no statutory basis exists for taking cognizance over such a controversy. The complaint alleges that jurisdiction is founded upon the general mandamus statute (28 U.S.C. 1361), and the Declaratory Judgment Act, 28 U.S.C. 2201. But 38 U.S.C. 211(a) precludes "an action

---

8/ In light of the lack of substance to appellant's equal protection argument there is no occasion to discuss the extent to which the Equal Protection Clause of the Fourteenth Amendment is applicable to actions of the Federal Government. Cf. Washington v. United States, 130 U.S.App. D.C. 374, 401 F. 2d 915, 922-923.

in the nature of mandamus or otherwise." The Declaratory Judgment Act, moreover, merely provides an additional remedy where the district court has jurisdiction under some other provision; it does not provide a self-sufficient basis of jurisdiction. United States v. King, 395 U.S. 1, 3-4; Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671; Wells v. United States, 280 F. 2d 275, 277 (C.A. 9).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

L. PATRICK GRAY, III,
Assistant Attorney General,

THOMAS A. FLANNERY,
United States Attorney,

ALAN S. ROSENTHAL,
WALTER H. FLEISCHER,
Attorneys,
Department of Justice
Washington, D.C. 20530

FEBRUARY 1971

GPO 890.511

REPLY BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24749

MARGARET F. MORENO, Appellant

v.

JOHN S. GLEASON, JR.,
Individually and as Administrator
of Veterans Affairs, Appellee

On Appeal from the United States
District Court for the District of Columbia

Alexander W. Sierck
Wald, Harkrader, Nicholson & Ross
1320 Nineteenth Street, N. W.
Washington, D. C. 20036

Attorney for Appellant

Of Counsel:

James A. Greer, II, Esquire
LeBoeuf, Lamb, Leiby & MacRae
One Chase Manhattan Plaza
New York, New York 10005

THE GOVERNMENT, IN ITS BRIEF IN SUPPORT OF THE GRANT OF ITS MOTION TO DISMISS APPELLANT'S COMPLAINT, HAS FAILED TO BASE ITS ARGUMENTS ON THE REQUISITE PREMISE THAT THE WELL PLEADED ALLEGATIONS IN THE COMPLAINT ARE TRUE.

Appellant alleged in her complaint that her veterans' compensation was wrongfully terminated without due process of law. In its brief in support of the grant of the motion to dismiss the government ignores these allegations and instead assumes the erroneous coloration of this case given by the Board of Veteran's Appeals in its 1969 opinion to be true. To argue that the motion to dismiss was properly granted, the government must treat the well-pleaded allegations of appellant's complaint as admitted (Walker Process Equipment Co. v. Food Machinery & Chemical Corp., 382 U.S. 172, 174-175 (1965)). This it has failed to do.

Presumably the government has failed to do so not out of ignorance but only to show that, overall, appellant was not treated unfairly. But the facts of this case do not justify such an inference. Indeed they raise significant questions as to the fairness of VA hearing procedures. Appellant alleges in her complaint the following prejudicial irregularities in the 1957 proceedings alone:

(1) The VA hearing examiner received ex parte opinions of VA doctors in flagrant violation of the Supreme Court's mandate in Morgan v. U. S., 298 U.S. 468, 480-482 (1936); cf. Norris & Hirschberg Inc. v. SEC, 85 U.S.App. D.C. 268, 163 F.2d 689 (D.C.Cir. 1947);

(2) The examiner without reason ignored the testimony of the physician who attended appellant's late husband during his terminal illness;

(3) The examiner ignored, suppressed or failed to examine the original autopsy report, which supported appellant's contention that her husband's death was service-connected;

(4) The examiner relied on a later and, as it turned out, completely erroneous autopsy report of mysterious origin;

(5) The entire proceeding was infected with the personal animosity against appellant held by certain high-ranking Army medical officers who were directly connected with the case, including the supervisor of the Army doctor who performed the original autopsy;

(6) There was no consideration of the opinion of the Commandant of Walter Reed Army Hospital, where

appellant's husband spent his dying days, that upon his personal knowledge her husband's death was indeed service-connected; and

(7) The only assistance appellant was able to obtain (because of the $10 ceiling on counsel fees in VA cases) was that of a demonstrably incompetent representative of a Veterans' "service" organization, not a lawyer, who made what can charitably be described as only a token effort on appellant's behalf.

Under these grievously prejudicial circumstances, appellant asserts that she was denied due process of law, and because of that, is entitled to seek redress in the federal courts from the wrongful VA action in spite of Section 211(a) and the Tucker Act.

BECAUSE APPELLANT HAS ALLEGED SERIOUS BREACHES OF HER CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW SHE IS ENTITLED TO A FORUM IN THE FEDERAL COURTS, SECTION 211(a) AND THE TUCKER ACT NOTWITHSTANDING.

In spite of the provisions of Section 211(a) and the Tucker Act* (§1346(d)), the federal courts must take

---

* In Wellman v. Whittier, 104 U.S.App.D.C. 6, 259 F.2d 163 (1968), Section 211(a) was held only applicable to those claims initiated by the voluntary filing of a VA Form P-526; there is no reason why the same rule should not be applied to the Tucker Act.

jurisdiction over certain limited categories of veterans' benefits cases, such as those alleging discrimination against veterans on racial or political (antiwar) grounds (see pp. 9-10 of Appellant's Brief). This Court thus need only decide whether appellant's case, on the basis of the allegations in her complaint, falls within this limited category.

The VA, because it is a human institution, is not immune from periodic lapses from the high standards established for it. Without some accountability to the federal courts, the VA's margin of arbitrary action will grow intolerably large. Experience indicates that this will indeed be the case; for example only a few months ago, Judge Gerhard Gesell found that:

> Widows are not being paid money legally owed them and the compassionate purpose of the Congress is being frustrated by the hypertechnical and dilatory practices of the Veterans Administration. (In re Filipino [sic] Cases, deCaasi, et al. v. Administrator of Veterans Affairs, ___ F.Supp. ____, 98 Washington Law Reporter, p. 143, July 24, 1970).

And this in spite of the purported procedural safeguards within the VA itself. Accordingly, this Court ought to rule in appellant's favor by enabling her to obtain judicial review of the VA's wrongful denial of her right to a fair hearing.

There is ample precedent for appellant's assertion that Section 211(a) and the Tucker Act are inapplicable to cases raising due process issues. In Reynolds v. U. S., 292 U.S. 443 (1934), the Supreme Court granted relief in a VA benefits case without even mentioning a controlling no-review provision, the 1933 predecessor of Section 211(a). Although the Supreme Court has never flatly ruled that a no-review provision is unconstitutional, this view has been strongly suggested where personal liberty is at stake, Estep v. U. S., 327 U.S. 114, 122-24 (1945).

Judge Wisdom in his dissent in Caufield v. Dept. of Agriculture, 293 F.2d 217, 228 (5th Cir. 1951), asserts that "no legislative language can deprive a man of a fair hearing in the adjudication of his rights; or of his right to have a court decide whether the administrative agency acted within its jurisdiction; and whether the agency through a lay tribunal applied the correct rule of law to the facts." In support, see the citations in his footnote 22 (Id.). Wisdom's position should be unequivocally adopted by this Court.

Further, one scholar asserts that the no-review provision of Section 211(a) is "unconstitutional on its face" (Frederick Davis, "Veterans' Benefits and Judicial Review, and the Constitutional Problems of 'Positive Government'", 39 Ind.L.J. 183 (1964)). Cf. Kenneth Culp

Davis, Administrative Law Treatise, 1970 Supplement, Ch. 28 "Unreviewable Action" at p. 964, where the author "wonder[s] about the wisdom of the congressional policy" behind Section 211(a).

The case of Goldberg v. Kelly, 399 U.S. 254 (1970), also is strong precedent in support of appellant's position. To be sure that case dealt with facts different from appellant's, but its importance lies in the Supreme Court's unequivocal recognition that all sources of government security, such as social security and welfare payments, are not gratuities, but are essentials, fully deserved, to which the due process guarantee adheres. Accordingly, even though Congress continues to deem VA benefits mere gratuities, this Court must not do likewise.

Respectfully submitted,

ALEXANDER W. SIERCK

Of Counsel:

JAMES A. GREER, II

March 2, 1971